

KADRI INTERNATIONAL CO.,)	AGBCA No. 2000-170-1
dba VALUECAD,)	
)	
Appellant)	
)	
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RULING ON CONTRACTOR-S MOTION FOR SUMMARY JUDGMENT

March 15, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On August 7, 2000, the Board received and docketed this appeal from Kadri International Co. dba ValueCAD, of Portland, Oregon (contractor) concerning a contract, No. 53-82X9-9-078CO, with the respondent, the U.S. Department of Agriculture, Forest Service (Government). As part of an automated lands project (ALP), the contractor was to consolidate information and provide the Government with electronically-formatted data depicting various features (e.g., easements,

ownership interests, boundaries, and natural features such as lakes) on particular townships or areas within Region 2 of the Forest Service (the Rocky Mountain Region). The contractor here appeals the termination for default of its contract, which occurred prior to the contract completion date.

The Board has jurisdiction over this appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. ' ' 601-613, as amended (CDA). The parties have engaged in discovery. A hearing on the merits has been set.

The contractor has submitted a motion for summary judgment. The contractor contends that undisputed facts and the law compel the conclusion that the default was improper, because the Government had waived its ability to default terminate the contract. The contractor notes that the Government encouraged continued performance by the contractor after it would be impossible to complete the contract by the contractual completion date if the Government enforced a contractual maximum of 30 submittals per week. That is, by the end of January 2000, long before the actual termination in May 2000, more work remained to be accomplished than time permitted if the Government limited the number of weekly submittals to the maximum stated in the contract. The contractor takes solace in the fact that, by the end of January, the Government had not reestablished a completion date and or acted immediately to stop performance.

The contractor maintains that these actions of the Government and the stated bases for termination

totally ignore the legal obligation of the government under the Default Clause, the Federal Acquisition Regulation, and existing case law, to act promptly when faced with the expiration of established and Acritical@ delivery dates in the context of Appellant-s continued performance resulting from the government-s active encouragement to perform. The need to act promptly was even more critical in this case due to the fact of impossibility if the government strictly enforced the 30 township criteria.

(Motion at 3). The contractor asserts that the Government waived the contractual right to default terminate the contract, specifically referencing DeVito v. United States, 188 Ct. Cl. 979, 413 F.2d 1147 (1969) (the Anecessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government-s knowledge and implied or express consent@).

The Government opposes the motion. It asserts that the termination for default is factually and legally supported. The contractor has submitted a reply to the Government-s opposition.

The motion for summary judgment is misguided as it miscasts the bases for the default and information in the record. The notice of default references the contractor-s inability to perform the work required under the contract, and specifies that the contractor has not provided assurance that it can perform the contract in a timely manner. The Government issued a cure notice dated

February 23, 2000, and a show cause notice dated April 12, 2000. In resolving this motion for summary judgment, a review of the existing record and the law does not compel the conclusion that the default determination was unjustified or unsupported. The facts and legal bases relied upon by the contracting officer in default terminating the contract (e.g., that the contractor had not achieved a rate of successful completion to permit completion within an acceptable time frame and the contractor had failed to provide assurances as to when the contract could be completed) have not been disproven or made inapplicable based upon the record existing at this stage of the proceedings.

The contractor's broad interpretation and application of DeVito is not borne out by the existing factual record. In upholding a termination for default, the United States Court of Federal Claims recently stated:

According to defendant, the evidence fails to indicate that the Army delayed terminating under conditions indicating forbearance. Instead, defendant argues, the facts indicate that it was aggressively attempting to require plaintiff to provide a completion schedule in order to determine whether forbearance was appropriate. We agree.

A.R. Sales Co. v. United States, 51 Fed. Cl. 370, 374 (2002). In the present case, with the record developed for resolving this motion, the contractor has not proven that forbearance occurred.

In summary, the contractor's motion relies upon specific facts. If the Government would accept no more than 30 submittals per week, the Government did not default terminate the contract at the time that it became impossible to complete performance within the contractual period. After that seemingly pivotal time, the Government encouraged the contractor's continued performance without establishing a new completion date. Given these facts, the contractor insists that the Board must conclude that the Government waived the right to default terminate the contract. However, the conclusion is not compelled legally. The Government's failure to default terminate at the time that action became available, together with the Government's encouraging contractor performance, does not automatically invalidate the termination for default.

The facts and legal bases relied upon by the contracting officer in default terminating the contract (e.g., that the contractor had not achieved a rate of successful completion to permit completion within an acceptable time frame and the contractor had failed to provide assurances as to when the contract could be completed) are not disproven by the existing record. Further, without drawing inferences adverse to the non-moving party (which is not to be done in resolving a motion for summary judgment), given the cure notice and notice to show cause and the Government attempts to obtain assurances that the contractor could and would perform the contract within an acceptable time, the Board cannot conclude that the Government actions constitute a waiver of its ability to default terminate the contract. Accordingly, the contractor has not demonstrated that summary judgment is appropriate.

RULING

The Board denies the contractor-s motion for summary judgment.

JOSEPH A. VERGILIO

Administrative Judge

Concurring:

HOWARD A. POLLACK

Administrative Judge

ANNE W. WESTBROOK

Administrative Judge

Issued at Washington, D.C.

March 15, 2002